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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 804 of 1998

(Arising from the decision in Criminal Appeal No. 256/85)

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.L.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

MAHENDRA HARJIVAN LUHAR

Versus

STATE OF GUJARAT AND OTHERS

Appearance:

MR KM SHETH for Petitioner

MR S.N.SHELAT, ADDL. ADVOCATE GENERAL WITH MR KAMAL
MEHTA, ADDL.PUBLIC PROSECUTOR for Respondent Nos. 1 to 4

MR SUDANSHU PATEL, ADVOCATE FOR THE RESPONDENT NO.5

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.L.DAVE

Date of decision: 05/02/99

ORAL JUDGEMENT: (Per R.K.Abichandani,J.)

This petition raises a somewhat unusual and

peculiar situation arising from the decision of this Bench in Criminal Appeal No.256 of 1985, allowing the acquittal appeal preferred against the judgement and order dated 14.11.1984 passed by the learned Additional Sessions Judge, Rajkot in Sessions Case No. 34 of 1984, acquitting the respondent of the charges of robbery, murder and receiving stolen property. The case of the petitioner Mahendra Harjivan Luhar is that he has been wrongly put behind bars though he was not the real accused in the Sessions Case and the respondent No.5 Ratilal, his younger brother had been tried for the offences, under his name. According to the petitioner, he is the eldest amongst five brothers and the names of his other brothers are Himmatt, Ratilal, Narsi and Ganesh. It is stated in the petition that on 12.6.1984, Rajkot Police had arrested the petitioner's brother Ratilal the respondent No.5 herein, in connection with the offences punishable under Sections 302, 459, 397 and 411 of the Indian Penal Code and it was the respondent No.5 who was taken in custody during the trial of Sessions Case No. 34 of 1984 in the Sessions Court at Rajkot. It is the case of the petitioner that the petitioner's brother Ratilal who was tried in the name of Mahendra was acquitted on 14.11.1984 and released from jail on that day. Thereafter, the Government had preferred acquittal appeal being Criminal Appeal No. 256 of 1985, in which the accused was convicted on 23.7.1998 and when the accused was to be heard on the question of sentence, the police had wrongly produced the petitioner before the High Court on 31.7.1998, though he was not the real culprit. He has stated in the petition that this Court had asked him as to whether he had put his signature on the notice of acquittal appeal and warrant, which were issued by this Court. He has stated that as he was shocked on being arrested and produced before the Court on 31.7.1998, he was not in a proper state of mind. It is stated that the petitioner was not, at that time, in a position to understand the gravity of the situation and he was not in a position to say that he was not the real culprit. It is stated that after he was sent to jail, his brother Narsi had made representations to the jail authority that the petitioner was not the real culprit, and that his brother Ratilal the respondent No.5 was the real culprit, against whom the offence was registered and who was tried by the Sessions Court. It is alleged that the petitioner is totally innocent and he has been languishing in jail in violation of his fundamental rights guaranteed by Articles 19 and 21 of the Constitution. It is contended that if the evidence of identification marks and finger prints of Ratilal taken during the investigation and trial were compared, then it

would be clear that the respondent Ratilal alias Mahendra alias Narendra was kept in jail custody during the trial and he was the person who had worked at Dhangadhra as a labourer in Raval Industries from 12.4.1984 to 14.11.1984. It is submitted that the fact that his younger brother Ratilal (respondent No.5) was the accused who was behind the bars during the trial can be ascertained from the record of Rajkot jail. It is stated that the jail authorities had produced Ratilal during the trial on various dates, which can also be ascertained. The petitioner has, on these facts, sought his immediate release invoking the jurisdiction of this Court under Article 226 of the Constitution, seeking a direction to take his brother Ratilal - the respondent No.5 who was said to be ready and willing to go behind the bars in custody. Though a compensation of Rs. 1 lac was claimed in the petition, at the hearing that claim was given up and the prayer contained in prayer clause 11(D) was deleted on 22.1.1999 and an additional prayer was made to recall the judgement and order made by this Court in Criminal Appeal No. 256 of 1985.

2. This petition was initially placed before the learned Single Judge on 4.9.1998 and at the request of the petitioner's Counsel, the same was adjourned to 23rd Sept. 1998. Thereafter, it appears from the record that the learned Single Judge made an order on 23.9.1998, directing the respondent No.3 to look in to the matter and to file necessary report on the returnable date i.e. 13.10.1998. Thereafter, the learned Single Judge made an order on 18.11.1998 recording that in the midst of the arguments, the learned Advocate for the petitioner had requested for an adjournment. It appears that thereafter the matter was placed before the Division Bench and the First Court comprising Hon'ble the Chief Justice and Justice M.S.Shah made an order on 9.12.1998 for placing this petition before this Bench. Accordingly this Bench was specially constituted and on 22.1.1999 the parties appeared and the learned Counsel for the petitioner made necessary amendments in the appeal memo.

3. We had, having regard to the gravity of the matter, requested the learned Additional Advocate General to appear in the matter on 19.12.1998 when the matter was first listed before us, and requested him to instruct the Department to find out the true facts as to whether the petitioner was not the accused who was tried in the Sessions case and acquitted and against whom the purported order in the acquittal appeal was made by this Court. On 22.1.1999, Ratilal the respondent No.5 had also remained present in the Court and had engaged his

Advocate Mr. Sudanshu S. Patel. An affidavit, a copy of which was placed on record which is said to have been made by Ratilal was relied upon by the petitioner to show that Ratilal was the real culprit, and the original affidavit which was placed on record was admitted before us by Ratilal - respondent No.5 as having been sworn by him. Ratilal the respondent No.5 has therein stated that he was the person who was in fact tried. The learned Additional Advocate General stated that a report would be placed on record on the question as to whether the respondent No.5 - Ratilal who was also present in Court was the real person against whom the trial was held and whether the petitioner who was produced at the time of hearing on the question of sentence was his elder brother. We directed the matter to be posted for hearing today and had ordered the jail authorities to produce the petitioner before us. The petitioner is present and is represented through his learned Counsel, and the respondent No.5 is also present and represented through his learned Counsel. The original record of Criminal Appeal No. 256 of 1985 has also been placed alongwith the main petition as per our directions contained in the order dated 22.1.1999.

4. It will be noticed from our order dated 31.7.1998 that when the petitioner Mahendra Harjivan Luhar was produced before this Court by the police pursuant to the non-bailable warrant issued by us on 23.7.1998 while allowing the acquittal appeal and convicting the respondent accused for the offences under Sections 302, 459 and 397 of the Indian Penal Code, we had heard the learned Counsel appearing for the accused - respondent, the Additional Public Prosecutor, and also the person who was produced by the Police before us as the respondent accused i.e. the present petitioner. The petitioner Mahendra Harjivan Luhar had, on that day, initially tried to urge that he was not the real culprit but when he was shown from the record the notices of the acquittal appeal which were served on him and were in his name and the execution of the bailable warrant, as also his statement dated 15.11.1985 that he should be given an Advocate at Government cost to defend him, the present petitioner who was produced before us stated at that time that he was served with the notices and the statement bears his signature. He then admitted that he was the person who was tried. We reproduce the relevant paragraph having bearing on this aspect from our order passed in the acquittal appeal on 31.7.1998.

"The accused, initially, tried to urge that he is
not the real culprit. He first stated that it

was his brother Ratilal who had committed the offence and had falsely given his (respondent's) name. To ascertain the correctness of this submission, we perused the record and the notices of the acquittal appeal which were sent in the respondent's name and upon perusal of the record of this High Court, it transpires that, while the acquittal appeal was admitted, bailable warrant in the sum of Rs. 2,000/- was issued against him.

We therefore, confronted him with the record showing the notices of the acquittal appeal were served on him and the warrant executed and his statement seeking that he should be given "appointed" advocate to defend him, which bear his signatures and which were forwarded to the High Court by the Sessions Court. He, on being confronted with this record, admitted that he was served with the notice and the statement was given by him and that they bear his signatures. He now admits that he is the person who was tried. We therefore, find no substance in his initial false suggestion that he is not the real culprit."

5. We were somewhat intrigued while hearing this petition to note that the petitioner who has come with a case that he was not the real culprit, had on 31.7.1998 when confronted with the service of notice of acquittal appeal on him and his statement which were admittedly bearing his signature, should have at that time on noticing the record admitted that he was the person who was tried before the Court, which fact we had recorded in our order dictated in open Court. We therefore, asked the learned Counsel for the petitioner to explain this sort of conduct and thereupon the petitioner who was again shown from the original record of this appeal the notice of acquittal appeal served on him and his statement asking for appointment of an Advocate to defend him in the acquittal appeal on the ground that he had no means and also forwarding a certificate of the Sarpanch, which he had obtained for the purpose, has while again admitting that they bear his signature stated before us in this Court that at that time (i.e. on 31.7.1998) on seeing his signatures in the notices of acquittal appeal and his statement, he had become nervous and that is why he had stated before us that he was the person who was tried.

6. The respondent No.5 who is represented through his learned Counsel stated before the Court that he was

the person who was tried in the name of Mahendra Harjivan Luhar i.e. in the petitioner's name. He has stated before us that his real name is Ratilal and that he is younger brother of the petitioner. In his affidavit which is on record and which was sworn on 2.9.1998, it is stated that during the Sessions trial he was taken in custody and had remained in the jail. He has stated that he was arrested on 12.6.1984 and was tried in Sessions Case No. 34 of 1984, in which he was acquitted on 14.11.1984. It is also stated that Criminal Appeal No. 256 of 1985, which was filed against that decision was admitted by the High Court. He has then stated that when the convict was ordered to be produced before the High Court on 31.7.1998, though he was the real culprit as per the offence registered, his elder brother whose name is Mahendra Harjivan Luhar was taken in to custody, as in the FIR as well as in the Sessions Court, he had wrongly stated his name as Mahendra. It is stated that his name is Ratilal, but at the initial stage as well as on being asked by the lower Court about his name, he had stated that his name was Mahendra, instead of Ratilal and therefore the matter had proceeded on that basis and the police had arrested his elder brother Mahendra instead of arresting him for producing the accused in this Court. After giving details as to how he was in custody during the trial, he has stated as under:-

"Therefore, admittedly I am the real culprit against whom the offence has been lodged and the sessions court has acquitted me while this Hon'ble Court has convicted me. Therefore, I should be put behind the bars as per the order of this Hon'ble Court and not my elder brother Mahendrabhai who is not at all concerned as against him no complaint has been filed and no trial is also conducted against him. Therefore, he has been wrongly sent behind the bars by the jail authorities though it was pointed out by Mahendrabhai as well as by me. I say and submit that today I am ready and willing to go behind the bars as per the order of the Hon'ble Court in Criminal Appeal No. 256 of 1985 passed by this Hon'ble Court on 31.7.1998."

7. The acquittal appeal was admitted on 13.9.1985 by a Division Bench consisting of D.C.Gheewala and J.P.Desai,JJ. and the following order was made at that time:-

"Leave granted. Appeal admitted. Bailable

warrant for Rs. 2000/- to issue."

Since the bailable warrant was returned unexecuted, a Division Bench consisting of J.P.Desai and B.S. Kapadia, JJ. made on 13.3.1986, the following order:-

"Bailable warrant to be executed."

The record of the appeal shows that the notice which was issued on the respondent accused was returned duly served and he intended to engage an Advocate at Government cost, being poor. He was therefore provided an Advocate. The letter dated 20.11.1985 of the learned District Judge, Rajkot, forwarded to the High Court reads 'notice duly served on the respondent' also stating that respondent had stated that he would require an Advocate at the cost of the Government. The notice which was sent to the High Court after service on the respondent, which is on record, was a notice issued for informing the accused about the orders made while admitting the acquittal appeal, requiring him to appear in the appeal and intimating that the acquittal appeal was admitted and that it was prayed therein to set aside the acquittal and hold the accused - respondent to be guilty of the said offences. At the end of that notice which was returned after service, there is signature of the present petitioner reading as 'Panchal Mahendrakumar Harjivan', which is shown to him and he admitted that it was his signature. Then there is a statement dated 15.11.1985, which was also shown to the present petitioner when he was produced as an accused on 31.7.1998 and in that statement also he had admitted his signature and even today, he admits his signature on these documents before us. In the statement dated 15.11.1985 he had stated that his financial position was very weak and that he did not have any property and he was therefore not in a position to incur any expenses. It is mentioned that he was served with a notice from the High Court and that he wanted an Advocate to be engaged at the Government expenses in the matter. It was also stated that he was producing a certificate of the Sarpanch of the Gram Panchayat to show that he did not have any property. That certificate dated 15.11.1985 which was forwarded alongwith the statement is also on the record of the appeal and Sarpanch had stated therein that the petitioner Mahendra Harjivan was not having any land in the village. The fact that the petitioner had obtained the certificate of the Sarpanch and forwarded it with his statement dated 15.11.1985 seeking appointment of an Advocate at Government expenses for defending him in the

acquittal appeal shows that he had sufficient time to react and that the act was deliberate. There is also in the record of appeal, communication dated 19.1.1988 from the Additional Sessions Court, Rajkot, in response to the bailable warrant which was issued while admitting the acquittal appeal, which reads as under:-

"Returned with compliments to the Registrar, High Court of Gujarat at Ahmedabad, through the Sessions Judge, Rajkot District, Rajkot. Bailable warrant is duly executed on accused Luhar Mahendra Harjibhai, he is present before this Court and furnished his surety of Rs. 2,000/- original bailbonds are kept with this Court. Hence this writ is duly certified. -

Sd/-

(M.A. Memon)

Addl. Sessions Judge, Rajkot."

8. It thus, transpires that the notices of the acquittal appeal were served on the present petitioner Mahendra Harjibhai Luhar and in response to the notice, the present petitioner had requested the High Court to appoint an Advocate for him to defend him in the appeal and had also forwarded with his statement a certificate obtained from the Sarpanch to the effect that he was not having any property. It was not at all stated either in the notice which was returned after obtaining his signature or in the statement dated 15.11.1985 that the petitioner was not the person who was tried as an accused in the said Sessions case from which the acquittal appeal had arisen.

9. Pursuant to our oral request to the learned Additional Advocate General to assist the Court for the State, he had given suitable instructions to the Department and has placed before us the report as to who was the real person who was tried. A copy of that report has been given to the petitioner's Advocate as well as the Advocate of the respondent No.5 and both of them have stated before the Court that the report is acceptable to their clients. In that report the detailed enquiry which was made by the police officer "B" Division Police Station, Rajkot City is narrated and it has been forwarded to the learned Additional Advocate General, through the Commissioner of Police. It is stated that Ratilal Harjivandas Luhar (the present respondent No.5) was arrested by Kadi Police Station for an offence under

Section 381 of the I.P.C on 22.10.1983 and at that time his photographs and finger prints were taken, which were noted in the Crime Record Card that was opened in respect of that person. This is with a view to show that the Police was already having in their files the photographs and finger prints of Ratilal the respondent No.5, which were taken in connection with a different offence on 22.10.1983. These photographs were shown to the witnesses (who had deposed at the trial) who stated that this was the person against whom the trial had taken place in respect of the offences which are the subject matter of the acquittal appeal. The finger prints of the present petitioner Mahendra Harjivan and also of the respondent No.5 Ratilal which were taken again were all forwarded to the finger prints expert, who has opined that the finger prints of the petitioner were not the finger prints of the person who was arrested in respect of the offences which were the subject matter of C.R No. 179/84 of Rajkot City "B" Division Police Station and the same person who was also arrested on 22.10.1983 by Kadi Police in connection with C.R No. I-51/79 for the offence under Section 381 of the I.P.C. In other words, the report that is placed on record clearly shows that the petitioner Mahendra Harjivan is not the person who was tried as an accused in the name of Mahendra Harjivan in the Sessions Case No. 34 of 1984 and acquitted on 14.11.1984 and that the respondent No.5 Ratilal was the person so tried in the name of Mahendra Harjivan and acquitted, against which acquittal, the Criminal Appeal No. 256 of 1985 was filed.

10. The question that arises before us is whether this Court can recall the order allowing the acquittal appeal which was made and which has resulted in the confinement of the petitioner who was produced by the Police as the convicted accused before us as a result of his brother having used his name at the trial and as a result of the petitioner not having disclosed at the earlier stage when the acquittal appeal notice was served on him that he was not the accused who was tried or that his brother Ratilal had falsely given his name on being arrested for the offences in question. The procedure for hearing appeals which are not summarily dismissed is laid down in Section 385 of the Code of Criminal Procedure, 1973. Accordingly, a notice of time and place at which the appeal will be heard is required to be given to the accused, if the appeal is under Section 377 or 378 of the Code, and, the accused is to be furnished with the grounds of appeal. In the present case, it was an appeal in case of acquittal under Section 378. Section 386 of the Cr. P.C inter alia provides that after perusing the

record and hearing in case of an appeal under Section 378, the accused if he appears, the appellate Court may in an appeal from an order of acquittal, reverse such order and find the accused guilty and pass sentence on him according to law. It is therefore, clear that the procedure for hearing of acquittal appeals requires the notice of hearing to be given to the accused and to hear the accused if he appears. Therefore, when the appeal was listed for final hearing, the accused who was tried and acquitted was required to be heard. The petitioner who was served with the notice of time and place at which the appeal would be heard, was not the accused who was tried and acquitted and the service on him could not bind the real accused. The petitioner's request that he may be given an Advocate to defend him in the acquittal appeal not being the request from the accused who was actually tried, could not bind the accused notwithstanding that he was tried in the name of the petitioner Mahendra Harjivan which he had falsely given as admitted by him in his affidavit filed in this petition and also before us in Court. Therefore, since no hearing was granted to the accused - respondent in the acquittal appeal because he was not served at all, no opportunity of hearing was given to the accused. The accused had a right to engage a lawyer to defend himself in the acquittal appeal and since he was not served with the notice of the appeal and did not appear when the acquittal appeal was heard, nor did he himself engage any lawyer to defend, there was no hearing given to him as contemplated by law. The accused in such a case cannot be said to have been heard at all and the hearing of a counsel appointed at the behest of the petitioner Mahendra Harjivan who was not the accused and was a stranger to the trial, was nothing but an exercise in futility to be fully ignored and it will have no effect in law being a decision in an appeal without serving any notice of hearing on the real accused. The decision was a nullity because it was given in the appeal which in reality was not heard as contemplated by Section 386 of the Code. The entire exercise was based on a wrong footing that the accused was served with the notice and being heard since the Court was misled by the conduct of the present petitioner Mahendra Harjivan in to a belief that his brother Ratilal who was the accused tried in his name was duly served with the notice of the acquittal appeal and had asked for an Advocate to be appointed for him which, as it now transpires, was not the fact. Since the order made in the acquittal appeal is a nullity, being void ab-initio, it has to be ignored as if non-est and for the purpose of record, is required to be recalled. There is no question of reviewing the order

made in the acquittal appeal which, in the eye of law, was a nullity and non-est, being void ab-initio.

In Swarth Mahto V. Dharmdeo, reported in 1972 S.C 1300, in which an appeal against acquittal was allowed and the accused was convicted without hearing his Counsel and the High Court had rejected the application for rehearing the appeal, the Supreme Court held that when an application was later made by the parties who were not heard, it would be an exercise of sound discretion if opportunity was given to the party who was not heard, meaning thereby the High Court ought to have allowed the application for giving a hearing to the applicant accused.

A Full Bench of the Rajasthan High Court in the case of Habu V. State of Rajasthan, reported in AIR 1987 Rajasthan 83, held that though there was no power of review under Section 362, it was a different matter when the acquittal appeal was decided without a hearing in the case and the order can be recalled under Section 482 of the Cr.P.C. and the appeal, since it was never heard against the accused will have to be restored to file for hearing.

In Indian Bank V. M/s. Satyam Fibres (India) Ltd. reported in J.T 1996 (7) S.C 135, the Hon'ble Supreme Court categorically observed in paragraph 20 of it's judgement that the Authorities, be they Constitutional, Statutory or Administrative, possess the power to recall their judgements or orders, if they are obtained by fraud as fraud and justice never dwell together. In paragraph 23 of the judgement it is stated that where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order. We gain strength from these observations of the Supreme Court in recalling our order, which cannot be allowed to perpetrate once it is established that the appeal was decided without hearing the real accused and that his elder brother whose name was used has landed in jail as a consequence of allowing the acquittal appeal. The appeal, since it was never heard against the accused, will have to be restored to file for hearing.

11. The notice of acquittal appeal and the bailable warrants issued at the time when the acquittal appeal was admitted, were required to be served on the accused who was tried. In the present case, since the respondent No.5 Ratilal Harjivan had assumed the name of his brother

Mahendra Harjivan - the petitioner, and was tried in that name, the High Court notices which had gone on the name Mahendra Harjivan, came to be served on the petitioner. At that stage, the fact that the accused Ratilal had been tried in the name of his brother Mahendra Harjivan falsely given by him was not detected. It was not noticed that the notice of the acquittal appeal which also mentioned issuance of bailable warrant was served on a person who was not tried as the accused. This is because the petitioner Mahendra Harjivan never raised any protest that he was not the accused and accepted the notice of the acquittal appeal and asked for appointment of a lawyer to defend him in the acquittal appeal. When the petitioner was not the accused as stated by him, he should have responded to the notice of acquittal appeal and the order issuing bailable warrant which was reflected in the notice, which admittedly was served on him truthfully, by stating that he was not the accused person and that his brother Ratilal was the real accused who had assumed his name at the trial. He suppressed this material fact and by such suppression and asking for appointment of an Advocate to defend him in the acquittal appeal, as if he was the real accused, he misled this Court by his conduct in to proceeding with the hearing of the appeal on the footing that the accused who was acquitted was duly served though he was not. Since the petitioner admittedly is the elder brother of the accused who is respondent No.5, the possibility of his connivance at the use of his name by the respondent No.5 at the trial cannot be ruled out, especially when the accused was acquitted in the trial Court. The petitioner would have ordinarily known the outcome of his brother's trial and the fact that his name was used by his brother at the trial especially when the notice of the acquittal appeal was admittedly served on him. Even at the time when the accused was arrested by the police on suspicion for committing the murder, the arrest of the respondent No.5 was flashed in the newspapers on 11.6.1984, as stated by the Police witness Fedrik in his deposition at Ex.50. Therefore, it could never have been unknown to the petitioner that the respondent No.5 Ratilal who was his younger brother had given his name when he was arrested and tried for the offences in question. If the petitioner was wholly unaware of his brother Ratilal having used his name at the trial, his conduct would have been of immediate resentment and pointing out to the Court in response to the notice of the acquittal appeal that he was never accused of any such offences. The fact that he accepted the notice of acquittal appeal without any such objection and asked for appointment of an Advocate to defend him in the appeal with-holding the

vital information that his brother Ratilal had used his name till the acquittal came to be set aside, would indicate a distinct possibility of the connivance of the petitioner at the use of his name by his brother Ratilal at the trial and an attempt to mislead this Court into proceeding with the hearing of the acquittal appeal, eventhough the petitioner was not the real accused. This attitude of the petitioner has landed him in jail, which he could have avoided had he at the initial state of service of notice of acquittal appeal and knowing about theailable warrant of arrest, disclosed to the police and the Court that he was not the real accused and that it was his brother Ratilal who was tried in his name. Even when he was confronted with the relevant papers showing that he was served with the notice of acquittal appeal and had asked for appointment of an Advocate to defend himself, he for reasons best known to him, had said before this Court on 31.7.1998 that he was the person who was tried, which fact was recorded in our order delivered in the Court at that time. Now he says that he had said so because he had become nervous at that time. We wonder whether these brothers were trying to take a chance, since after the accused Ratilal Harjivan had hoodwinked the police and the trial Court by his being prosecuted in the name of his brother Mahendra Harjivan, even the petitioner Mahendra Harjivan thought it to be equally safe to allow the acquittal appeal to proceed in his name though his real brother Ratilal was the accused. Whatever be the intentions and omissions that have led to the present impasse, one thing is certain that the petitioner has been by mistake of identity confined to jail since he was not the accused person against whom the acquittal appeal was allowed and who had at the trial, assumed the name of the petitioner, which fact the petitioner had with-held from this Court till the acquittal was set aside. Since the petitioner virtually allowed his name which was assumed by his brother Ratilal - the accused to continue in the acquittal appeal, by deliberately not disclosing that his brother Ratilal had used his name at the trial, the petitioner has landed himself into this trouble and created an embarrassing situation for the system which surfaces its shortcomings in such instances when detected. The concerned authorities should have taken sufficient care to ensure that the person who was tried as the accused and acquitted was served with the acquittal notice and the arrest warrants issued by the High Court in 1985 when the acquittal appeal was admitted, executed on him and care should have been taken by the police to produce before this Court the real accused against whom the State had preferred the

acquittal appeal. But for the setting aside of acquittal order dated 23.7.1998 by which the accused was required to be arrested and produced for being heard on sentence in the acquittal appeal the mischief played at the trial by the accused of assuming false name of his brother Mahendra would never have been detected. It is indeed surprising that though the petitioner who was not the real accused was served by the police with the notice of acquittal appeal issued by the High Court and the accused was produced before the Sessions Court while executing the bailable warrant of Rs. 2,000/- issued by the High Court, it was not detected by the police or perhaps not brought to light that the respondent No.5 Ratilal who was the real accused was tried in the name of his brother Mahendra. We expect the State Government to probe in to this departmentally to rule out involvement of the concerned police personnel. We would leave the matter at that and direct immediate release of the petitioner who, as per the report filed by the Additional Advocate General, is not the real accused who was tried in his name and against whom the acquittal appeal was filed in his name, though purported to be defended by him by seeking appointment of an Advocate.

12. The learned Additional Advocate General who has handled the matter with his usual fairness has submitted that the incident calls for guidelines for future precautions to see that the identification of the accused remains established throughout the trial and appeal proceedings and there is no mix up of the nature that has occurred even if an attempt is made by an unscrupulous accused, who gave false name in the investigation or at the trial. He points out to us that Crime Record Cards of the accused are being maintained and in the instant case, the one which was shown to us contained photographs of the respondent No.5 Ratilal in connection with an offence under Section 381 of the I.P.C registered by Kadi Police Station, which we have referred to hereinabove. The appellate Court has no means to ascertain as to whether the person brought before it is the accused who was tried, in absence of his photographs on the record. The Court would ordinarily assume that its writ notices and warrants are served and executed on the accused who was tried and whose acquittal appeal is under consideration. As can be seen from the record of the present case, after the bailable warrant in the sum of Rs. 2,000/- was issued by the High Court and it was executed, it is not clear as to who was produced before the learned Additional Sessions Judge, who executed the

warrant by releasing the accused on bail pursuant to the orders made in the acquittal appeal at the admission stage. When the notice of the acquittal appeal was admittedly served on the present petitioner, it becomes clear that even when the bailable warrant was executed and the accused was brought before the Court for being released on bail pursuant to the orders made by the High Court at admission stage in the acquittal appeal, it was not detected that the accused had been tried in the name of the present petitioner, while his name was Ratilal. It is not clear as to who was produced before the Court when the order of releasing the accused was made pursuant to the bailable warrant issued by this High Court in the acquittal appeal. If the respondent No.5 Ratilal was produced at that time and was released in the name of the petitioner and it going unnoticed that he was tried in a wrong name, then a peculiar position arises which needs to be examined by the State Government, that, when the notices of the acquittal appeal were admittedly served on the present petitioner who was not the real accused, who was the person really produced before the Court of the Additional Sessions Judge and how is it that the petitioner who was served with the notice of the acquittal appeal was not the person who was produced, as stated by his learned Counsel and the respondent No.5 Ratilal was in fact produced as stated by the learned Counsel for the respondent No.5 and also by both these persons in Court before us. In order to attempt to ensure that no mischief as to the identity of the accused or mistake occurs, we find it necessary that directions should be issued on the concerned authorities through the State Government to ensure that:

- (a) At the time of arrest of any person for a crime while noting his identification marks, photographs of such person must invariably be taken and made a part of the record, which would enable such person to be identified at any stage after his arrest;
- (b) Such photographs should also be submitted to the Court with the charge-sheet and be part of the papers of the trial;
- (c) Whenever appeals are filed, the appellate record must contain the photographs of the accused concerned;
- (d) The photographs should be enough in

number to show the accused clearly from his front pose as well as his side pose, and should include a photograph of the accused in a standing position;

(e) The photographs of the accused person should be duly authenticated by the concerned officer who arrested the accused person;

(f) An authenticated copy of the Crime Record Card of the accused should also form part of the record before the trial Court and be transmitted to the Appellate Court when the appeal is preferred;

(g) In all Sessions triable cases, when warrants of arrests are issued, the photographs and marks of identification should be cross-checked with the accused;

(h) In all Sessions triable cases, at the time of arrest, the identity of the accused should be properly verified and care should be taken to ascertain his correct name and address;

(i) The Officer arresting the accused must certify the particulars showing the identity of the accused and the fact that his correct name and address have been ascertained. Such certificate should accompany the charge-sheet which is sent to the Court;

(j) In all acquittal appeals also whenever notices and warrants are issued by the High Court, the photographs and marks of identification should be cross-checked with the accused and when the notices are returned duly served and the warrants executed, they should accompany a certificate by the concerned Court forwarding them to the effect that the accused has been duly served after verifying his identity, name and address.

13. In view of what we have said above, we make the following order:-

1. The judgement and order made by this Bench on 23.7.1998 convicting the accused - respondent in appeal and the order of sentence imposed pursuant thereto on 31.7.1998 in Criminal Appeal No. 256 of 1985 are treated as non-est, and nullity, and stand recalled. As a consequence, the petitioner Mahendra Harjivan Luhar is ordered to be released forthwith. The Criminal Appeal No. 256 of 1985 stands restored to file for hearing and the respondent No. 5 Ratilal Harjibhai Luhar who has stated and is shown to be the real accused who was actually tried in the Sessions Case is allowed to defend the acquittal appeal as the accused - respondent. The respondent No.5 Ratilal who is present says that he is the real accused against whom the said acquittal appeal was filed and that he surrenders himself to custody and does not pray for bail. The respondent No.5 - Ratilal who is present in Court be taken in custody forthwith. The acquittal appeal be immediately listed for final hearing before an appropriate Bench.

2. The following directions are issued which will be implemented by the State Government and will also be circulated to all subordinate Courts by the Registry.

(a) At the time of arrest of any person for a crime while noting his identification marks, photographs of such person must invariably be taken and made a part of the record, which would enable such person to be identified at any stage after his arrest;

(b) Such photographs should also be submitted to the Court with the charge-sheet and be part of the papers of the trial;

(c) Whenever appeals are filed, the appellate record must contain the photographs of the accused concerned;

(d) The photographs should be enough in number to show the accused clearly from his front pose as well as his side pose, and should include a photograph of the

accused in a standing position;

- (e) The photographs of the accused person should be duly authenticated by the concerned officer who arrested the accused person;
- (f) An authenticated copy of the Crime Record Card of the accused should also form part of the record before the trial Court and be transmitted to the Appellate Court when the appeal is preferred;
- (g) In all Sessions triable cases, when warrants of arrests are issued, the photographs and marks of identification should be cross-checked with the accused;
- (h) In all Sessions triable cases, at the time of arrest, the identity of the accused should be properly verified and care should be taken to ascertain his correct name and address;
- (i) The Officer arresting the accused must certify the particulars showing the identity of the accused and the fact that his correct name and address have been ascertained. Such certificate should accompany the charge-sheet which is sent to the Court;
- (j) In all acquittal appeals also whenever notices and warrants are issued by the High Court, the photographs and marks of identification should be cross-checked with the accused and when the notices are returned duly served and the warrants executed, they should accompany a certificate by the concerned Court forwarding them to the effect that the accused has been duly served after verifying his identity, name and address.

Rule is made absolute accordingly.

(R.K.Abichandani,J.) (A.L.Dave,J.)

